tion procedure. In **Ross v. State**, 204 Ind. 281, 182 N. E. 865 (1932), the accused was required to grow a beard and place a handkerchief across his face.

This Court upheld a requirement that the accused wear a garment worn by the guilty party in the case of Holt v. United States, 218 U. S. 245 (1910). It is likewise no violation of the Fifth Amendment privilege to require the accused to furnish a specimen of his handwriting. **Bryant v. United States**, 244 F. 2d 411 (5th Cir. 1957).

The history of the privilege against giving testimony guaranteed by the Fifth Amendment teaches that it is only the forced communication of some fact concerning the incident from the accused which is prohibited. The mere muscularization of the vocal cords for the purpose of identification is not the same as eliciting from the accused his awareness of facts concerning the crime. **Holt v. United States**, *supra*. This Court held that the privilege protected by the Fifth Amendment is limited to testimonial disclosures in the case of **Schmerber v. Calif.**, 384 U. S. 757 (1966). See also **Rochin v. Calif.**, 342 U. S. 165 (1952); **U. S. v. Wade**, 388 U. S. 218 (1967).

On June 12, 1967, this Court decided three cases which control the questions raised in this case. In **U. S. v. Wade**, *supra*, and **Gilbert v. Calif.**, 388 U. S. 263 (1967), this Court held that a pretrial identification procedure is a critical stage in a criminal proceeding which requires the presence of defense counsel. It is conceded by the respondent that the defendant was without counsel in the case at bar at the time of the identification, but nevertheless the holding in **Wade** and in **Gilbert** is not retroactive but prospective only. The holding in the case of **Stovall v. Denno**, 388 U. S. 293 (1967) resolves the question with respect to whether or not the respondent must be represented by counsel at his identification procedure.

Although the petitioner was not deprived of his Fifth Amendment privilege against self incrimination nor was

he deprived of his Sixth Amendment right to counsel, this Court is asked to review the circumstances of the identification to determine whether or not they were so suggestive as to deprive the petitioner of his right to a fair trial as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

This Court in the case of **Stovall v. Denno**, *supra*, held that although the accused was not denied his Sixth Amendment rights because of the prospective application of **Wade** and **Gilbert**, the matter could be reviewed in order to determine whether a fair trial was given him. This review for the purpose of determining whether or not the identification confrontation was fair, was made upon the authority of **Palmer v. Peyton**, 359 F. 2d 199 (4th Cir. 1966). This Court stated that a "claimed violation of due process of law in the conduct of a confrontation depends on the totality of the circumstances surrounding it". It is necessary that this Court review the circumstances surrounding the identification of the petitioner in the case at bar. It is significant that the Court in the case of **Palmer v. Peyton** reviewed the circumstances and determined that the accused therein was deprived of a fair trial as guaranteed by the Fourteenth Amendment although that particular question had never been raised below. It is also significant that the Court in the **Palmer** case cited no authority upon which it reviewed the circumstances surrounding the identification.

The petitioner Biggers was arrested during the night of August 16, 1967, taken to juvenile court and released by the juvenile court to the metropolitan police of Nashville. Mrs. Beamer had been raped months earlier and had from time to time visited the police department in an attempt to identify suspects. She was called to identify if possible the petitioner while he was being held on a separate and unrelated charge. He had been advised at the juvenile court of his constitutional rights as had his

mother. He was displayed to Mrs. Beamer at police headquarters and asked to speak certain words. She had reviewed police files and viewed suspects during the months since her rape. The identification which she made of Biggers was not the product of suggestion but was the result of many months of investigation. Mrs. Beamer identified the petitioner in Court also. There is no indication that her identification in the courtroom was the result of police suggestion nor is there any indication that her identification in the courtroom was the result of or influenced by her identification before trial.

In the **Stovall** case the accused was handcuffed to one of five police officers who, along with members of the District Attorney's Office, brought him to a hospital room in which the victim of the assault was confined. He was identified by the victim from her hospital bed after having been required to speak "words and voice identification". This Court held that the circumstances were not such as to indicate that the petitioner Stovall was deprived of his right to a fair trial as guaranteed by the Fourteenth Amendment. The facts in the **Stovall** case are very similar to the facts in the case at bar.

This Court should affirm the conviction of the petitioner for rape. There is nothing in the record to indicate that the petitioner has been deprived of his right to due process.

Respectfully submitted,

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